TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 904.

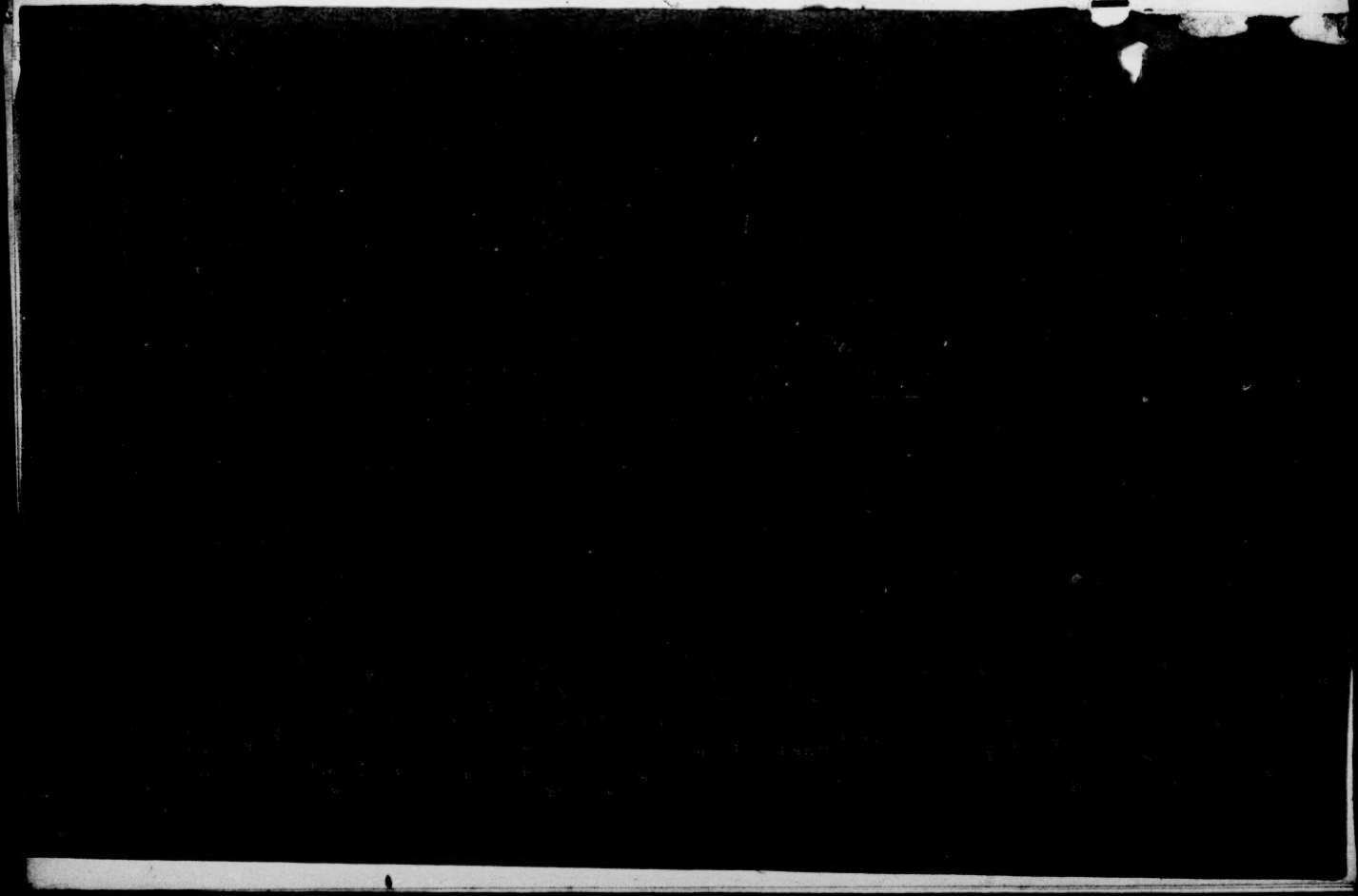
THE CITY OF OMAHA, PLAINTIFF IN ERROR,

vs.

AARON HAMMOND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 27, 1876.



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1 Pleas before the Hon. Elmer S. Dundy, judge of district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the eighth judicial circuit and district aforesaid, at the term of November, 1875.

Be it remembered that on the 7th day of October, 1874, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

Petition.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT.

The said Aaron Hammond, plaintiff, for his cause of action against said The City of Omaha, defendant, alleges that said defendant is a municipalcorporation, duly created and existing under and by virtue of the laws of the State of Nebraska, and is a citizen of said State, being situate within the county of Douglas, in said State, and that said
2 plaintiff is a citizen of the State of Illinois. The said plaintiff further alleges that on the 8th day of October, A. D. 1870, the said defendant duly entered into a certain contract, in writing, of that date with said plaintiff, a copy of which said contract is hereto attached and made a part of this petition, and marked "Exhibit A;" that by the terms of said contract the said plaintiff was to sink and construct two wells in said city of Omaha; one on California street, between 13th & 14th streets, and one at the intersectiyn of Jackson and 14th streets, said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall nine inches in thickness, and arched over in a secure and proper manner, the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city, the whole work to be completed within three months from the date of said contract; and that in consideration of the performance of said work by said plaintiff, for the use and benefit of said defendant, the said defendant, by the terms of said contract, agreed to pay to said plaintiff the sum of one hundred dollars for each and every one thousand gal-
3 lons of water which each of said wells would be capable of producing and should produce within twenty-four hours, the capacity of said wells to be tested by said chief engineer, and upon the report of said officer being made to the city council of said city, showing that said well or wells were completed and satisfactory, and also showing the amount of water said well or wells could produce in twenty-fours, then said plaintiff was to be entitled to and was to receive from said defendant the said sum, in city warrants, as follows, to wit: three-fourths of said sum to be paid on the completion and acceptance of the first well, the other fourth to be retained until the completion and acceptance of the second well, when the entire sum was to be paid. The said plaintiff further alleges that said two wells were by him duly sunk, constructed, and fully completed according to the terms and requirements of the said contract, and within three months from the date thereof, under the supervision of said chief engineer, and to said engineer's satisfaction. And the said plaintiff further alleges that owing to a disagreement between said chief engineer and said plaintiff, after the completion of said

wells as aforesaid, as to the mode of testing the capacity of
4 said wells and ascertaining the amount of water each was capable of producing within twenty-four hours, the said engineer refused to fully test the capacity of said wells, or either of them, and the said engineer refused, and, although often requested so to do, still does refuse to make any report whatever to the city council of said city showing the amount of water said wells were capable of producing in twenty-four hours, and although frequently admitting that said wells were completed and satisfactory, has constantly refused to make any report with reference thereto, though often requested. And the said plaintiff further alleges that since the completion of said wells the said defendant has had the full enjoyment of and has constantly used the same; and that said city council and said chief engineer, well knowing that a large sum of money was justly due said plaintiff from said defendant on said contract, and well knowing that said defendant was in the full use and enjoyment of said two wells, have willfully and negligently refused to take any action whatever whereby the amount to which said plaintiff is entitled under said contract could be ascertained. The said
5 plaintiff further alleges that each of said wells are capable of producing and have produced 37,500 gallons of water within twenty-four hours; that city warrants at the time of the completion of said contract were worth 90 cents on the dollar, for which frequent demand has been made on said defendant by said plaintiff, to the amount due him on said contract; that no part of the amount due said plaintiff has ever been paid, except the sum of $600 ⅞, paid in city warrants, November 8th, 1870, and that there is now justly due said plaintiff from said defendant on said contract the sum of $6,831.00, and interest thereon from January 8th, 1871, besides costs, for which said plaintiff prays judgment.

W. J. CONNELL,
Pltf.'s Atty.

UNITED STATES OF AMERICA,
District of Nebraska, Douglas County, Neb., ss:

W. J. Connell, being first duly sworn, says he is attorney for the plaintiff named in the foregoing petition, who is a citizen of the State of Illinois, and now absent from said district of Nebraska; that affiant knows the contents of said petition, and believes the facts therein stated to be true.

W. J. CONNELL.

6 Subscribed in my presence, and 'worn to before me this 7th day of October, A. D. 1874.

WATSON B. SMITH, *Clerk.*

EXHIBIT A.

This agreement, made and concluded the 8th day of October, A. D. 1870, by and between A. Hammond, of Jacksonville, Illinois, of the first part, and the city of Omaha, Nebraska, of the second part, witnesseth: That the said party of the first part, in and for the consideration hereinafter expressed, to be paid by the said party of the second part, hereby agrees with the said party of the second part to sink and construct two wells, one on California street, between 13th and 14th streets, and one at the intersection of Jackson and 14th streets, in said city, said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall (9) nine inches in thickness, and arched over in a secure and proper

manner, the whole to be completed under the supervision and to the satisfaction of the chief-engineer of the fire department of said city; the whole work to be completed within three months from the date of this contract.

And the said party of the second part, for and in the consider-
7 ation of the performance of the said work, to be performed by the said A. Hammond, for the use and benefit of the said party of the second part, hereby agrees to pay the said party of the first part the sum of one hundred dollars ($100) for each and every one thousand gallons of water which each of said wells shall be capable of producing and shall produce within twenty-four hours, the capacity of said wells to be tested by the chief engineer of the fire department of the city of Omaha aforesaid; and upon the report of said officer being made to the city council of said city, showing that the well or wells are completed and satisfactory, and also showing the amount of water the said well or wells will produce in twenty-four hours, then the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in city warrants, as follows, viz: Three-fourths of the said sum to be paid on the completion and acceptance of the first well, the other fourth to be retained until the completion and acceptance of the second well, when the entire sum is to be paid.

In witness whereof we have hereunto set our hands the year and day first above written.

8 (Signed) A. HAMMOND.
E. A. ALLEN,
Prest. of City Council.

[U. S. stamp, cancelled.]

Upon the back of said petition appear endorsements in words and figures following, to wit:

No. 90, C. United States circuit court, district of Nebraska. Aaron Hammond vs. The City of Omaha. Petition. Filed Oct. 7, 1874. Watson B. Smith, clerk. W. J. Connell, plft.'s atty.

Thereupon afterwards, to wit, on said 7th day of October, 1874, a summons was issued in said case, which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America, to the marshal of the district of Nebraska, greeting:

You are hereby commanded to notify the defendant, The City of Omaha,
9 that it has been sued by Aaron Hammond in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha; that unless it answer by the 9th day of November, A. D. 1874, the petition of the said plaintiff against it, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 19th day of October, A. D. 1874.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 7th day of October, A. D. 1874, and in the 99th year of the Independence of the United States of America.

Attest:
[SEAL.] WATSON B. SMITH, *Clerk.*

Upon the back of said summons appear endorsements in words and figures following, to wit:

No. 90, C. United States circuit court, district of Nebraska. Aaron Hammond vs. City of Omaha. Summons. Amount claimed of the defendant by the plaintiff is $6,831.00 and interest thereon from
10 Jan. 8th, 1871, and cost of suit. Returned and filed this 9th day of Oct., 1874. Watson B. Smith, clerk. W. J. Connell, plff.'s atty.

Attached to said summons is the return of the marshal for said district, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 7th day of October, 1874, I received the within summons, and on the 8th day of October, 1874, I served the same upon the within named The City of Omaha, in Douglas County, State and district of Nebraska, by delivering to and leaving with Champion S. Chase, mayor of the said city of Omaha, a certified copy of this summons, with all the endorsements thereon.

WILLIAM DAILY,
United States Marshal for the District of Nebraska,
By ELLIS L. BIERBOWER,
Deputy United States Marshal.

Marshal's costs, $2.06, pd. by plff.'s atty.

Thereupon afterwards, to wit, on the 9th day of Nov., 1874, an answer was filed in said case, which said answer is in words and figures following, to wit:

11 In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT.

The defendant above named, The City of Omaha, for answer to the petition filed herein, says:

I. It admits its incorporation as charged in said petition, and it says that no such contract as set up in said petition appears upon the files of said city, nor is there any record of the making of such a contract, and therefore defendant denies the making of the contract, a copy of which is attached to said petition.

II. But it says that, on the 9th day of August, 1870, the said Aaron Hammond presented to the city council of the city of Omaha a certain proposition in writing, by the terms of which said Hammond proposed to dig, wall up, and complete certain wells for said city for the use of the fire department of said city, (the said Hammond well knowing
12 that such wells could be of no use or benefit to said city except for such purpose,) and guaranteed that each of said wells should be capable of producing daily at least one hundred thousand gallons of water, (said Hammond well knowing the fact to be that such wells would be absolutely useless and of no value or benefit to said city for said purpose without being capable of producing at least said amount of water daily.) That in pursuance of said proposition said

contract was entered into, and said Hammond began to prepare said wells, and that while the same were being prepared, by reason of falsely representing that he was constructing them of sufficient capacity to fulfill said proposition and guaranty and to be of use to the said fire department, he procured from said city the sum of six hundred dollars in warrants wholly without consideration.

That after the date of the contract set up in plaintiff's petition, and at the time said Hammond commenced said worke, he contracted and agreed with said city, through its officers and committees, and guaranteed to construct said wells so that the same should be capable of
13 producing said amount of water as aforesaid, daily, and that it was in pursuance of this last agreement that he prosecuted and completed said undertaking.

Defendant says that the two wells constructed and prepared by said Hammond, as in said petition alleged, were not completed according to contract, within the time alleged in said petition, and the same were built and constructed in so negligent and unworkmanlike a manner that the same were and became wholly useless and of no value or benefit to said city for the use of its fire department, or for any other purpose. That when the same were completed they were tested by the chief engineer of the fire department of said city, as in said contract specified, and found to be so small and so negligently constructed as to be wholly useless, and that they were not capable of producing daily the amount of one hundred thousand gallons, nor the amount alleged in said petition, nor any other amount of water sufficient to render them of any use or benefit to the said city for the use of its said fire department, and thereupon said engineer so notified said Hammond,
14 and refused to accept said wells. That said wells were never accepted by said city, nor in fact have the same ever been or become of any use and benefit to said city, and said Hammond has failed, neglected, and refused to put said wells into such a condition that they would become of any use or benefit to said city.

III. Defendant says that by reason of the failure of said Hammond to construct said wells so as to be a source of supply to the fire department of said city, as he agreed to do, it has been put to great damage and has expended large sums of money, to wit, the sum of five thousand dollars in constructing and procuring the construction of large cisterns to furnish a supply of water equal to that contracted for with said Hammond, and which it became absolutely necessary to procure for the use of said fire department owing to the failure of said Hammond to furnish said supply, and thereby this defendant has been damaged by the failure of said Hammond to comply with his contract in the sum of six hundred dollars moneys paid him, together with the sum of five thousand dollars expended as aforesaid with interest thereon from
15 December 1st, 1870. Whereof defendant asks a judgment herein against said plaintiff for the sum of five thousand and six hundred dollars, with interest from December 1st, 1870, with costs of suit.

JOHN M. THURSTON,
Deft.'s Atty.

UNITED STATES OF AMERICA,
District of Nebraska, Douglas County, ss:

Champion S. Chase, being duly sworn, says he is the mayor and chief officer of the corporation defendant, The City of Omaha, named in the foregoing answers; that he has heard said answer read and believes the facts therein stated to be true.

C. S. CHASE.

Signed in my presence and sworn to before me this 9th day of November, A. D. 1874.

WATSON B. SMITH,
Clerk.

Upon the back of said answer appear endorsements in words and figures following, to wit:

16 No. 90, C. United States circuit court, district of Nebraska. Aaron Hammond vs. The City of Omaha. Answer. Filed Nov. 9, 1874, Watson B. Smith, clerk. J. M. Thurston, deft.'s atty.

Thereupon afterwards, to wit, on the 14th day of November, 1874, a motion was filed in said case, which said motion is in words and figures following, to wit:

In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

Motion to strike portion of answer.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT.

And now comes the said plaintiff, by W. J. Connell, his attorney, and moves the court to strike out of the answer of the defendant filed herein the entire portion of the III clause of said answer, except prayer for judgment, the same being irrelevant and immaterial, and setting forth a statement of damage too remote to entitle said defendant to recover thereon.

W. J. CONNELL,
Plff.'s Atty.

17 Upon the back of said motion appear endorsements, in words and figures following, to wit:

No. 90, C. Circuit court, district of Nebraska. Aaron Hammond vs. City of Omaha. Motion to strike portion of answer. Filed Nov. 14, 1874. Watson B. Smith, clerk. W. J. Connell, plff.'s atty.

Thereupon afterwards, at the November term of said court, and on the 14th day of November, 1874, the following proceedings were had in said case, as appears of record on folio 93, journal C, of said court, to wit:

AARON HAMMOND
vs.
THE CITY OF OMAHA.

This cause coming on to be heard this day upon the motion of said plaintiff to strike out part of the answer of the defendant, was argued to the court by attorneys for said parties.

Whereupon it is ordered by the court, the same being fully advised in the premises, that said motion be and the same is sustained.

18 Thereupon afterwards, to wit, on the 20th day of November, 1874, a reply was filed in said case, which said reply is in words and figures following, to wit:

In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

Reply.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT.

And now comes the said Aaron Hammond, plaintiff, and, in reply to the answer of said defendant filed herein, denies that on the 9th day of August, 1870, or at any other time, he presented to the city council of Omaha a proposition in writing, by the terms of which said plaintiff proposed to dig, wall up, and complete certain wells for said city, for the use of the fire department of said city; and said plaintiff further denies that he knew such wells could be of no use or benefit to said city, except for such purpose, or that said plaintiff at any time, either before or
19 after the date of the contract, set forth in said plaintiff's petition, guaranteed that each of said wells should be capable of producing daily at least one hundred thousand gallons of water or any other amount, or that said plaintiff well knew the fact to be that such wells would be useless and of no value or benefit to said city for said purpose, without being capable of producing at least said amount of water daily; and said plaintiff further denies that in pursuance of such proposition the said contract was entered into, or that said plaintiff began to prepare said wells in pursuance of the same, or in pursuance of any other proposition or arrangement than the said contract itself, or that while said wells were being prepared said plaintiff procured from said city the sum of $600⅘ or any other sum, in warrants or otherwise, without consideration, either wholly or in part, by reason of falsely representing that he was constructing said wells of sufficient capacity to fulfill said proposition and guaranty, and to be of use to the said fire department, or by reason of any false representations whatever, or that said sum of $600⅘ was received by said plaintiff in any other manner than
20 according to the terms of said contract and in pursuance thereof, the said defendant then, at the time of such payment, well knowing the condition of said wells; and the said plaintiff further denies that after the date of said contract, or at any other time, he contracted and agreed with said defendant through its officers and committees, or in any other manner, to construct said wells so that the same should be capable of producing one hundred thousand gallons of water, or any other quantity, daily, or made any guaranty with regard to the same whatever, or that the same were prosecuted and completed in pursuance of any other arrangement, agreement, or understanding than according to the terms of said contract; and the said plaintiff further denies that said wells, or either of them, were built and constructed in so negligent and unworkmanlike a manner that the same were and became wholly useless and of no value or benefit to said city for the use of its fire department, or for any other purpose, or that the same when completed, upon being tested by the chief engineer of the fire department of
21 said city, were found to be so small and so negligently constructed as to be wholly useless, or that said wells were not capable of producing an amount of water sufficient to render them of any use or benefit to said defendant, or that said engineer so notified said plaintiff and refused to accept said wells or that the facts with regard to the completion and acceptance of said wells or the use and value thereof

to said defendant are any other than in said plaintiff's petition alleged; and therefore said plaintiff asks judgment against said defendant, according to the prayer of his said petition.

W. J. CONNELL,
Plff.'s Atty.

UNITED STATES OF AMERICA,
District of Nebraska, Douglas County, Nebraska, ss:

W. J. Connell, being first duly sworn, says he is attorney for the plaintiff named in the foregoing reply, who is a citizen of the State of Illinois, and now absent from said district of Nebraska; that affiant knows the contents of said reply, and believes the facts therein stated to be true.

W. J. CONNELL.

22 Subscribed in my presence and sworn to before me this 20th day of November, A. D. 1874.

WATSON B. SMITH, *Clerk.*

By L. H. FELT, *Deputy.*

L. H. FELT,
Dep. Clerk U. S. Circuit Court.

Upon the back of said reply appear endorsements in words and figures following, to wit:

No. 90, C. United States circuit court, district of Nebraska. Aaron Hammond vs. The City of Omaha. Reply. Filed Nov. 20th, 1874. Watson B. Smith, clerk. W. J. Connell, plff.'s atty.

Thereupon afterwards, to wit, on the 15th day of April, 1875, depositions were filed in said case, which said depositions are in words and figures following, to wit:

In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

Notice of the taking of depositions.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT.

23 To the defendant above named:

You are hereby notified that the deposition of said Aaron Hammond, plaintiff, will be taken de bene esse under the act of Congress in that behalf on the 10th day of April, A. D. 1875, commencing at the hour of ten o'clock a. m., at the office of R. D. Russell, esq., in Jacksonville, county of Morgan, and State of Illinois, to be used on the trial of the above-entitled action, at which time and place you are notified to be present and put such interrogations as you think fit.

The reason for taking such deposition is that said witness lives and resides at a greater distance than one hundred miles from the place of trial of said action. Dated at Omaha, Nebraska, April 1st, 1875.

WM. J. CONNELL,
Atty. for said Plff.

OMAHA, NEBRASKA, *April 1st*, 1875.

As the duly appointed city attorney for said City of Omaha, defend-

ant, and atty. of record for said defendant, I do hereby accept service of the within notice to take depositions, and do acknowledge receipt of a copy thereof.

24 JOHN M. THURSTON,
Deft.'s Atty.

UNITED STATES OF AMERICA,
Southern District of Illinois, State of Illinois, Morgan County, ss:

Be it remembered that on this 10th day of April, A. D. 1875, I, Robert D. Russell, a notary public within and for the county and State aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit court of the United States, under and by virtue of the acts of Congress in that behalf, did call and cause to be and appear personally before me, at my office in Jacksonville, in said Morgan County and State, and district aforesaid, Aaron Hammond, to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at Omaha, in said district, wherein the said
25 Aaron Hammond is plaintiff and The City of Omaha is defendant, H. G. Whitlock appearing with the said Aaron Hammond as counsel, and John M. Thurston appearing for the said City of Omaha, defendant. And the said Aaron Hammond being about the age of fifty-seven years, and having been by me first *continued* and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and he did thereupon depose, testify, and say as follows, to wit:

AARON HAMMOND:

Interrogatory 1. State your name, age, occupation, and place of residence.

Answer 1. Name, Aaron Hammond; age, 57 years; occupation, locating and sinking wells; residence, Jacksonville, Morgan County, Illinois.

Int'y 2. How long have you been engaged in the well-digging business, and to what extent?

Ans. 2. Have been engaged in locating and sinking wells more
26 or less for twenty years; making a specialty for the last five or six years; working from three to twelve men; most of the time finding employment on an average for six or eight men.

Int'y 3rd. What relation do you sustain to this suit?

Ans. 3. Am plaintiff.

Int'y 4th. Did you at any time ever have a contract with the defendant herein for sinking two wells in the city of Omaha? If so, state the time, location, and whether or not said contract was in writing.

Answer 4. I made a written contract with the city for sinking two wells; one was on California street, between 13th & 14th; the other was on 14th street, at or near the intersection of Jackson, located where Mr. Sheeley designated, I showing him where the vein did run. Joseph F. Shealy, (the last portion of the answer, referring to the designation by Mr. Shealy of the locality, objected to for the reason that nothing appears in evidence showing that the said Shealy had any authority from the defendant to designate the location of said well,) chief-engineer of the fire department, I mean. Contract was dated Oct. 8th, 1870.

27 Int. 5th. Who prepared the contract and at whose request was it prepared, and what is the date thereof?

Ans. 5th. The contract was prepared by the city attorney of Omaha, from resolutions passed by the city counsel authorizing E. A. Allen,

president of the city council, to make a contract for sinking said wells, who ordered the city attorney to draw up the contract for the city.

(Objected to, all that portion of the answer relating to the alleged authority of E. A. Allen to act for the city, for the reason that the records of the action of the city council are the best evidence.)

Int'y 6th. By whom was the contract signed, and when?

Answer 6. It was signed by E. A. Allen, president of the city council, for the city, and by me in my own behalf, in the office of the city attorney in the city of Omaha.

Int. 7th. Was any other contract or arrangement ever entered into with regard to said two wells, or either of them, than the one referred
28 to by you?

Answer 7. There was never any other contract made with regard to said wells, or either of them, except the one referred to.

Int. 8th. Now state fully what you did under said contract, whether or not you sunk and constructed said two wells, when completed, under whose supervision, if any one, the diameter of said wells, how curbbed, how arched, and all the particulars with reference to the sinking and constructing of said wells.

Answer 8. I commenced work on said wells, sunk and completed them within about thirty days, it being only about one-third the time given me in the contract; the work was done under the supervision and to the entire satisfaction of Joseph F. Shealy, chief of the fire department of the city of Omaha. I sunk the wells twelve feet & some three or four inches in diameter, of which I told Mr. Shealy while sinking them. In sinking said wells he said it was all right. (All conversations between the plaintiff and said Shealy objected to, for the reason that the same
29 are irrelevant and immaterial, and no authority has been shown giving said Shealy the right, in any way, to act for or bind said city of Omaha.) In sinking to the vein at the bottom of the wells we sunk smaller, which was also under said Shealy's direction. In sinking said wells we used wooden curb, bricking up inside of them and arched them over, laying the arch with mortar, putting in an iron flange at the top and covering the same with an iron cover, bricking up the straight part; we layed the brick angling, so that all the brick would break joints one with the other, the corners projecting into the well, which Mr. Shealy said he greatly preferred, it would make the wall much stouter.

Int. 9th. Who, if you know, was the chief engineer of the fire department at the time said wells were being constructed?

(Question objected to for the reason that the records of said city are the best evidence.)

Answer 9th. Joseph F. Shealy.

Inter. 10th. How frequently was he present during the progress of the work, and what, if anything, did he say with regard thereto?
30 Ans. 10th. I saw him at the wells some two or three times a week. (All evidence relating to the action of said Shealy in relation to the construction of said wells, and also all conversations had between the plaintiff and the said Shealy, objected to as being irrelevant and immaterial, and no authority has been shown authorizing said Shealy to act for or bind the city of Omaha.) He might have been there oftener; could not say, as I was sinking both wells at the same time; he might have been there some time when I was not present—I might have been at the other well. He said that it was not necessary for him to call so often, that I knew how the work should be done and was having it done right. I told him I preferred to have him call often, as there might be something which he would prefer to have done differently.

Int. 11th. Did he ever test the capacity of said wells, or engage any one so to do? State fully the particulars with regard to what he did and what was said.

(Objected to same as above.)

Answer 11th. After the well was finished on California street,
31 he pumped out the water with a steam fire-engine and engaged a Mr. King to measure the water as it rose in the well, taking the time of the same. The following day Mr. King went to Mr. Shealy's meat-market, on Farnam street, reporting—(all reports made by said King, and all conversations had between him and any person whomsoever, and all acts done by him objected to, for the reason that no authority is shown for said King to act for or bind the city of Omaha, and for the further reason that evidence of any such reports or conversations is hearsay evidence, and the same is irrelevant and immaterial)—the height the water rose, and the time in which it rose, I think some ten feet. Mr. Shealy figured up the amount said well would supply in twenty-four hours at that ratio, making some 38,000 gallons. I being present, he, Jos. F. Shealy, said to me—(objected to as before)—it would amount to a large sum of money. Afterwards, he gave it as his reasons for not making a report for the payment of said test, that he did not know whether the contract meant to pay for what water the well would hold, letting it stand twenty-four hours, or what it would supply in
32 twenty-four hours. I told Mr. Shealy that if the water was taken out of the well as it came into it, it would supply at least twice the water that it would by raising to the height of the measurement by Mr. King's report. I told him that I had sunk wells many times that would afford many times daily the amount of water the wells would hold; that I sunk the wells for the amount of water they would supply, not what they would hold by standing twenty-four hours, the size of well sunk, nor the amount of work done on them. Mr. Shealy only tested one of said wells.

Int. 12th. Did said chief engineer report to the city council the capacity of said wells, or make any report with regard to the completion of said wells, and as to whether or not they were satisfactory?

Answer 12th. He made no report to my knowledge, except a verbal statement he made in my presence to the city council, stating the quantity of water it would supply in the test he made by Mr. King, and said he did no' know whether the contract meant to pay for what
33 water the well would supply in twenty-four hours, or what it would raise to hold, standing that length of time.

Int. 13th. Why, if you know, did the chief engineer fail to make any report?

Ans. 13. Because, as before stated, he said he could not tell, or did not wish to decide, whether the contract meant to pay for what said wells would supply in twenty-four hours, or what would come into them in twenty-four hours, letting it stand that length of time.

Int. 14th. State, if you know, how much water each of said wells were capable of producing within twenty-four hours.

Ans. 14. The well on California street, in sinking it I procured a pump of the Union Pacific Railroad Company, four-inch cylinder, I think about eight-inch stroke. After we came to the vein we pumped, I think, at least forty strokes a minute, which would make some 48,000 gallons per day. The well on 14th street and Jackson, or near the intersection thereof, we used one pump of the same kind & size, also a four-
34 inch cylinder single-acting pump, which, throwing one-half the amount of the double-acting pump—which would make 72,000 gal-

lons in the same ratio—kept three men pumping from one to two weeks, night and day, keeping out the water so that we could work it.

Int. 15th. How much have you received from defendant on said contract, and when?

Ans. 15. I received $600 on said contract before the wells were completed.

Int. 16. How much is now due you thereon?

Ans. 16. Allowing the wells to supply 120,000 gallons a day, it would amount to $12,000; deducting $600.00 would leave eleven thousand four hundred dollars ($11,400) due me. If the water could be taken out of said wells, then continue to take it out for one day, more or less, as it come into said wells, for twenty-four hours, it would give an accurate amount of what water it would supply in twenty four hours as per contract.

35 Int. 17th. State whether or not at any time you ever made any guaranty as to the amount of water said wells would produce.

Answer 17th. I never made any guaranty as to the quantity of water said wells would produce, or to what height it would raise in said wells, or to the depth you would have to sink to obtain it.

Int. 18th. State any other facts within your knowledge not already referred to, which may have any bearing upon this case.

Ans. 18th. After the wells were completed, Joseph F. Shealy, chief engineer of the fire department, examined said wells. He said they were all right, except the well on California street needed to be graded up a little and different tops put in; that the one which was there did not project far enough down into the rim to hold it from slipping around; which was done; after which he examined it, and said they were all right and completed as per contract.

(All of the above answer objected to for the same reasons hereinbefore given.)

36 Int. 19th. If you have the original contract referred to, please attach the same to your deposition, and refer to the same, and mark the same "Exhibit A."

Answer 19th. I have said contract with me, which I attach to my deposition, and mark it "Exhibit A."

Int. 20th. Now state whether or not you ever had any talk or arrangement with the city council, its officers, or committeemen, or any one else, by which any change was to be made in said contract.

Answer 20. I never had any talk or made any arrangements with any one changing the original contract which I have attached to this my deposition as per request.

Cross-examination:

Cross-interrogatory I. How long had you resided or been in the city of Omaha prior to entering into the contract above referred to?

(Objected to as irrelevant.)

Answer I. I could not say; probably from three to six weeks, being away part of that time.

37 Cross int. 2. Did the proposition to construct said wells come from you to the city, or from the city to you, in the first instance?

(Objected to as immaterial.)

Answer 2. I talked with some of the councilmen, who told me to put in a proposition to the council. I done so; which proposition was accepted by the city council, the resolution passed authorizing E. A. Allen, president of the council, to make said contract.

Cross-int. 3. Was the proposition to which you have referred in writing and signed by you?

(Objected to as irrelevant, immaterial, and improper.)

Ans. 3rd. It was.

Cross-int. 4th. Did the resolution of the city council by you referred to instruct said Allen to execute a contract between yourself and the city, according to the proposition made by you as above stated?

Ans. 4th. The proposition was presented to the city council, who authorized Mr. Allen to make a contract for the wells. They ac-
38 cepted the proposition.

Cross-int. 5th. After said proposition was first presented by you to the city council was it not referred to a committee of the council, and did not said committee or its members consult with you upon the matter?

Answer 5th. I could not say, but think the proposition was referred to a committee. I talked with the various alderman about the matter at different times.

Cross-int. 6th. Did you not represent to such committee, its members, the members of the council, and other officers of the city, that such wells would be far better for the use of the fire department of said city than the cisterns then in use by such department?

(Objected to for the reason that it has already appeared there was a contract in writing between the plaintiff and defendant, which cannot be varied or changed by parol testimony, and into which all conversations prior and contemporaneous are merged.)

Answer 6th. I told them, as I would any one else, that in case
39 of a dry time a well that would fill itself with water would be preferable to a dry cistern with no water; that in taking the water out many times in the morning it would be full by noon, consequently it would be better than the cisterns.

Cross-int. 7th. At the time you made the proposition to the city council did you not know that these wells were to be constructed and used for the sole purpose of supplying the city with water for the use of its steam fire-engines?

(Question objected to for the reason that the digging of the wells was under contract in writing, and cannot be varied by parol, and is therefore immaterial.)

Ans. 7th. It was supposed that they were to be used for fire purposes; the size of those wells proposed by Shealy and others was to be 8 or 10 feet in diameter; they thought 8 or 10 feet would be big enough. I told him that it would be better to make them larger, to make them 12 feet, to hold more water.

(All the answer after the part in direct answer to the question objected to by defendant's counsel as not being in answer to the in-
40 terrogation, and as immaterial and incompetent.)

Cross-int. 8th. Examine this document, and state if it is not the proposition above referred to signed by you and presented for the city council as aforesaid.

(Question objected to for the reasons that all anterior propositions are merged in the contract in writing, in evidence.)

Answer 8th. This is a proposition I made to the council. In regard to the wells I made a proposition, not claiming in those localities 100,000 gallons a day, not claiming that those would furnish that amount, but telling them of localities where we could get it, where there were larger veins—not locating the wells exactly.

(A copy of the proposition referred to is hereby made, and at request of defendant's attorney attached to this deposition, marked "Exhibit B."

Cross-int. 9th. Is not this proposition the only proposition in writing

made by you to the city council of Omaha prior to the 8th day of October, 1870, the date of your contract with the city?

41 (Question objected to for the same reason as above.)

Answer 9th. I put in other propositions to the council for sinking wells before that date, I think; I am sure that I did.

Cross-int. 10th. How many other propositions in writing did you present to the city council prior to said date?

Answer 10. There was, I think, either one or two communications or propositions laid before the council prior to the date of the contract. I could not recollect with certainty how many.

Cross-int. 11th. Are you as certain of that fact as of any other matter or thing testified to by you on this examination?

(Objected to for the reason that it is immaterial, calls for opinion of the witness in measure of his own processes of reasoning or memory.)

Answer 11th. I am not as positive about the number of propositions—there was a good deal of talk, in writing, about it at different

42 times—as I am about circumstances that I can remember distinctly as to times and places.

Cross-int. 12th. Were not all other propositions made by you in writing to the city council, made after the 8th day of October, 1870, and in reference to other wells?

(Objected to because immaterial.)

Answer 12th. I am very sure they were not. I recollect before the order was passed by the council to Mr. Allen to contract for those wells, I went with Mr. Shealy to different localities, probably five or six different places, telling him that I could get, I thought, certain amount of water, stating the amounts. Those two places I told him the amount would be small to what we could furnish at other points.

(Defendant objects to all the last portion of the answer as being no part of an answer to the interrogation.)

Cross-int. 13th. Is not this proposition here produced, dated August 9th, 1870, the identical proposition which you have referred to in your direct examination as having been presented to the city council,

43 referred to a committee, accepted by the council, and a contract ordered drawn up on such acceptance?

(Question objected to because it assumes the witness stated the contents of a proposition in his examination-in-chief which does not so appear; and, second, for the reason that all antecedent propositions are merged in the contract in writing, in evidence.)

Answer 13th. I have answered that a number of times; I don't know that I can answer any better. The proposal was for sinking wells, the localities shown to Mr. Shealy, in different places, where we could get 100,000 gallons in two wells within this distance of the streets; those I told him would not supply as much as the other veins. Mr. Shealy wanted to get water at those places because there was no water in that part of town; no cisterns or no wells sunk to use in case of fire.

Cross-int. 14th. Are you now prepared to give a direct answer to the last question; and if so, what is it?

(Question objected to for the same reason as above.)

44 Ans. 14th. It is not, according to my recollection and understanding of it.

Cross-int. 15th. Do you pretend to say that this proposition is not the identical proposition mentioned by you in your direct examination?

(Objected to for same reasons as above.)

Answer 15th. I can't answer anything more about it than I have. I think there were other propositions; I know there were other proposals.

It is not the proposition that Mr. Allen was instructed to make the contract on; that is the meeting of the council the night he was authorized to make the contract for sinking the wells in those localities, and this proposition would not be in that locality—not within four blocks of Farnum street.

Cross-int. 16th. Is that the only reason, because that the localities where the wells were sunk are outside of the localities mentioned in this proposition, that you have for believing that this contract was not drawn up on the acceptance of this proposition by the city council?

(Question objected to for the reason, first, that it is immaterial;
45 second, all antecedent propositions are merged in the contract in writing.)

Answer 16th. I know that there were other arrangements made for sinking the wells, as I have before said that we selected different places for sinking the wells, selecting those places first and proposing to have others sunk where there were larger veins when these were completed.

(Defendant's attorney protests and objects to the continued and persistent refusal of the witness to give a direct answer to the questions propounded to him.)

Cross-int. 17th. Can you answer yes or no to the last question?

(Objected to for same reason as above.)

Answer 17th. I have given other reasons.

Cross-int. 18th. Did you not, upon various occasions, while endeavoring to secure a contract from the city for the construction of these wells, represent to the members of the council and other officers of the city, as an inducement for letting the contract, that such wells would
46 produce, and have at all times ready for use by the steam fire-engines, more water than could be contained in any of the cisterns then in use by said city for fire purposes?

(Objected to for the reason that all antecedent and concurrent statements made to the parties are merged in the contract in writing, in evidence.)

Answer 18th. It would greatly depend upon the size of the wells sunk; when the water was taken out of the wells it would flow in, consequently be ready in case of fire. It could not be supposed that the city council and officers would think a well twelve feet in diameter would hold more than a cistern 20 feet in diameter; but the well that size would afford more water in case of fire than the cistern would if there was no water in it. I did not represent to the city council and officers as the question suggests, for the reasons explained.

Cross-int. 19th. Were these wells sunk by you twelve feet in diameter inside the brick-work?

47 Answer 19th. They were not inside the brick-work.

Cross-int. 20th. What was the diameter of these wells near the top, inside the brick-work?

Answer 20th. Some ten feet and a half.

Cross-int. 21. How deep was the well on California street sunk, and how deep the one on Jackson street?

(Objected to as immaterial.)

Answer 21. The well on California street, I think, some 25 or 26 feet from the surface, may be a little more. The one on Jackson street, I think, the main well, was some 24 feet or a little more. That is, the one on California street, that much to the vein of water.

Cross-int. 22nd. What was the diameter of these wells at the bottom, inside the brick-work?

Ans. 22nd. The size I don't recollect of the well sunk in the bottom

to reach the vein. The main well, on Jackson and 14th street', was, I think, some ten and a half feet within the brick-work, having been sunk twelve feet four inches before being curbed.

48 Cross-int. 23rd. How deep from the bottom of the main wells did you sink the smaller shaft?

Answer 23rd. The one on California street, I think, perhaps some four feet; could not say accurately. The one on Jackson street was sunk considerably deeper, probably fifteen or twenty feet, to reach the vein.

Cross-int. 24th. About what was the diameter of these smaller shafts inside the brick work?

Answer 24. I think about four feet in diameter.

Cross-int. 25th. How thick was the brick curbing in the smaller shafts?

Answer 25. Smaller shafts *was* not sunk with the well at all; *was* merely to reach the vein of water, and *was* curbed with timber substantially, and not bricked up; done under the direction and supervision of Mr. Shealy, chief engineer of the fire department. The wells were dug and partially bricked up before the smaller shaft was sunk; were not arched over.

49 Cross-int. 26th. Were these smaller shafts sunk perpendicularly from the bottom of the wells as first constructed?

Answer 26th. They were, as nigh as we could dig them.

Cross-int. 27th. Is it not a fact that these wells were both dug and nearly bricked up, and that having found that the supply of water running into them would be entirely inadequate, *that* you then sunk these smaller shafts for the purpose of attempting to reach a better vein of water?

(Objected because immaterial.)

Answer 27. It was not. The well on 14th and Jackson we had to keep three men pumping from one to two weeks while we were sinking it down, running two pumps as before stated.

Cross-int. 28th. If the supply of water in the wells as first sunk was ample for the purposes for which they were being constructed, why was it necessary for you to sink these so-called smaller shafts?

50 Answer 28th. It was for the purpose of securing a little larger supply.

Cross-int. 29th. How high from the bottom of the main shaft did the water raise in each of these wells after they were completed.

Answer 29. The well on 14th and Jackson rose within some seven or eight feet of the surface, I think, the ground being raised in the street some four feet where the well is, which would make the water standing within four feet of the original surface of the ground before the street was raised; they raised the street some two or three feet after the well was sunk. The well on California street, I think, come within 8 or 9 feet of the surface of the ground; that is my recollection; could not say positively; they raised the ground some over where the well was sunk.

Cross-int. 30th. How long were you in constructing these two wells?

Ans. 30th. Some thirty days; about that.

51 Cross-int. 31st. What was the average number of men you employed in constructing them, outside of the brick-work?

(Objected to as immaterial.)

Ans. 31st. As we worked both wells at the same time, we worked probably from ten to fifteen hands; we worked nights sometimes.

Cross-int. 32nd. About how many nights did you work your men in constructing these two wells?

(Question objected to as immaterial.)

Ans. 32. I could not tell accurately; we kept three men pumping on one of the wells a week or two, night and day.

Cross-int. 33. Was you present when Mr. King tested the well on California street?

Ans. 33. I was not.

Cross-int. 34. Did you ever test the well on California street after it was completed?

Ans. 34. I did not; but before completion we pumped over 40,000 gallons a day.

52 Cross-int. 35. Did you ever test said well in any other manner than by keeping men employed pumping it out while you were constructing it?

Answer 35. I did not, only by letting it raise, and then pumping it out, taking the time it took to raise a foot or two.

Cross-int. 36. Did Mr. Shealy or any other person, on behalf of the city, ever test the well on Jackson street, to your knowledge?

Answer 36. Did not, to my knowledge, though I requested Mr. Shealy to do so several times.

Cross-int. 37. Did you ever test the well on Jackson street before it was completed, in any other manner than by keeping men employed pumping it out while you were constructing it?

Answer 37. I did in one instance, when we quit work on said well; that is, we quit sinking on Saturday night about 12 o'clock. Sunday morning I went down to the well, and the water had rose some

53 thirteen feet or a little over; would make water come in then some near 8,000 gallons in a little over six hours, to my recollection.

Cross-int. 38. What time Sunday morning did you go to the well?

Answer. 38. I went down to the well soon in the morning, to my recollection some six or seven o'clock; could not say for certain the time.

Cross-int. 39. In measuring the depth of water which had run into the well, did you measure from the bottom of the large shaft or the bottom of the small one?

Ans. 39. I measured from the bottom of the large shaft.

Cross-int. 40. What is the cubic measurement of a gallon of water?

Ans. 40. I think it is two hundred and thirty-one inches, according to my recollection.

Cross-int. 41. How many gallons of water will a circular shaft

54 ten and one-half feet in diameter and thirteen feet in depth contain?

Ans. 41. A little over 8,000 gallons.

Cross-int. 42. Did you ever, after the well on Jackson street was completed, test it in any manner?

Ans. 42. Not to my knowledge.

Cross-int. 43. How did you sink the smaller shafts in these wells—by digging or boring?

Ans. 43. By digging, except in the bottom of the one on Jackson street, when we bored a short distance, some two or three feet.

Cross-int. 44. What was the size of the auger used in boring the bottom of this well?

(Objected to as immaterial.)

Answer. 44. I think about two feet in diameter.

Cross-int. 45. Did not Joseph Shealy, hereinbefore referred to, refuse to approve said wells and to recommend payment for the same,

55 for the reason that they were not completed according to the con-

tract, and for the further reason that they were inadequate and not fit for the purpose for which they were constructed?

(The second clause of the question objected to, for the reason that it assumes that in the contract the plaintiff agreed to construct the wells for a certain purpose, which does not appear in the contract in evidence.)

Answer 45. He did not; he said they were finished according to contract, and the only reason that he gave for not reporting them for payment as per his test by Mr. King that he did not know whether the contract meant to pay for the water they would supply in one day or for what the wells would hold.

Cross-int. 46. After these wells were constructed did you present any bill for the amount you claim due to the city council?

(Objected to as immaterial.)

Answer 46. I did not make out a bill, as Mr. Shealy was to test the wells and see the quantity of water. I called several times on
56 different members of the council, requesting them to have it fixed up—that is, to have the amount fixed, so that I could get my pay; also for Mr. Shealy to test the wells. Nothing was done to my knowledge. I remained there some two weeks, I think, after they were completed; got a telegram from home that my little girl was very sick, so had to come, they promising to attend to it right away, to see to it as soon as they could.

Cross-int. 47. At the time you left Omaha, were you not engaged in the construction of several other wells of a similar character, which you left partially done and uncompleted?

(Objected to as immaterial.)

Ans. 47. There was one well which we commenced digging; as my folks were sick, I contracted with another man to finish it. It was sunk and curbed. It was 20 feet in diameter.

Cross-int. 48. After you left Omaha, how long was it before you communicated with the city council in reference to this claim?

(Objected to as immaterial.)

57 Ans. 48. I wrote to them two or three times, and never received any answer within a short time to let me know how the other job was progressing.

Cross-int. 49. To whom did you write such letters and where was you when you wrote them, and about what was the date?

(Objected to, first, as immaterial, and second, because if the witness is to be question' as to any letter, it must be produced or its absence accounted for.)

Ans. 49. I think it was some time in December I wrote from here; then I was out West, somewhere in Missouri or Kansas. I think I wrote once, one letter I think was directed to the city council of Omaha, and another to an alderman, whose name, I think, was Kelly. The first news I got from Omaha from any one after I left there was Mr. Connell, my attorney that I now have there, which letter reached me over thirteen months after it was written and mailed.

58 Cross-int. 50. How long was it after you left Omaha before you sent your claim to any person for collection or authorized any one in Omaha to secure the same?

Answer 50. Before I left Omaha I spoke to a man to attend to it for me, (A. J. Poppleton,) and let me know. Afterwards—I suppose probably three or four years after I was there before—I ordered this other man to commence suit.

Cross-int. 51. In the mean time had you ever written to Poppleton in reference to the matter?

(Objected to as immaterial.)

Ans. 51. Don't recollect that I did write to him.

Cross-int. 52. Have you at any time presented, or caused to be presented, to the city council of Omaha any statement of the amount claimed by you as due and unpaid under your contract?

(Objected to as immaterial.)

Ans. 52. I made statements to the councilmen, and stated to Mr. Shealy the amount before I came away, as before stated; and
59 stated the amounts I thought the wells would supply.

Cross-int. 53. When did the contract produced by you, and attached to your deposition, first come into your possession?

Ans. 53. The 8th of October, 1870, the day it was signed.

Cross-int. 54. In whose possession has it been since that time?

Ans. 54. It has been in my possession most of the time.

Redirect examination:

Interrogatory 1. Your attention has been called to an article in writing, dated August 9th, 1870, and directed "Mayor and city council of the city of Omaha," containing a proposal to sink wells in said city. Please state whether the wells, under the agreement of October 8th, 1870, are within the territory and limits spoken of in the article of August 9th, 1870.

60 Answer 1. I think they are not.

Interrogatory 2. State whether Joseph F. Shealy at any time made any objections to the method of your performing the work sued for in this case, and if at the time of their completion his attention was called to the fact of their completion, and whether or not he then expressed any dissatisfaction with the manner or character of the work.

Answer 2. He did not make any objections to the manner in which it was done. He made no objection to the method of my performing the work. I notified him when the wells were completed. He called and examined them. He told me the wells were all right, excepting the well on California street needed grading up a little and the tops exchanged, for the reasons before stated. He then examined them and said they were completed according to contract.

Plaintiff's counsel at the commencement of the cross-examination herein reserved the right to object to any or all of the cross-interrogatories and answers on the trial, as he might desire.

AARON HAMMOND.

61 EXHIBIT A.

(Presented in connection with int. 19 of this dep., Apl. 10, '75. R. D. R., N. P.)

[U. S. internal-revenue stamp, five-cents, cancelled.]

This agreement, made and concluded the 8th day of October, A. D. 1870, by and between A. Hammond, of Jacksonville, Illinois, of the first part, and the city of Omaha, Nebraska, of the second part, witnesseth:

That the said party of the first part, in and for the consideration hereinafter expressed, to be paid by the said party of second part, hereby agrees with the said party of the second part to sink and construct two wells, one on California st., between 13th and 14th streets, and one at the intersection of Jackson and 14th streets, in said city, said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall (9) nine inches in thickness, and arched over in a secure and proper man-

ner; the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city, the whole work to be completed within three months from the date of this contract. And the said party of the second part, for and in consideration of the performance of the said work to be performed by the said A. Hammond, for the use and benefit of the said party of second part,
62 hereby agrees to pay the said party of the first part the sum of one hundred ($100) for each and every one thousand gallons of water which each of said wells shall be capable of producing and shall produce within twenty four-hours; the capacity of said well to be tested by the chief engineer of the fire department of the city of Omaha aforesaid, and upon the report of said officer being made to the city council of said city, showing that the well or wells are completed and satisfactory, and also showing the amount of water the said well or wells will produce in twenty-four hours, then the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in city warrants, as follows, viz: three-fourths of the said sum to be paid on the completion and acceptance of the first well, the other fourth to be retained until the completion and acceptance of the second well, when the entire sum is to be paid.

In witness whereof we have hereunto set our hands the year and day first above written.

A. HAMMOND.
E. A. ALLEN,
Prest. of City Council.

63 EXHIBIT B.

(Presented Apl. 10, '75. R. D. R.)

OMAHA, NEBRASKA, *Aug.* 9, '70.

To the honorable mayor & city council of the city of Omaha:

I propose to sink wells in the city of Omaha on veins of water on public grounds of city. I will sink wells that will furnish one hundred thousand gallons of water (on the public grounds of the city) in one day, the amount to be tested by the city pumping out the same one or more days in succession; not more than one or two wells to be sunk east of thirteenth street unless the city council request the same. I will sink two wells within four blocks of Farnham street, as far west as thirteenth, one to the north and one south of Farnham, the city paying me one hundred dollars per thousand gallons for one day's supply of the before-mentioned one hundred thousand gallons of water, the city to pay for the water as the wells are completed, reserving twenty per cent. of the amount till the completion of the contract, then to settle for the full amount.

A. HAMMOND.

64 UNITED STATES OF AMERICA,
Southern District of Illinois, State of Illinois, Morgan County, ss:

I, Robert D. Russell, a notary public within and for said Morgan County, in the State and district aforesaid, under and by virtue of the acts of Congress relating to testimony and the taking of depositions to be used in the courts of the United States, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the testimony of the said witness is material and necessary for the plaintiff in the cause in the caption of the said deposition named, and that the

said witness lives, and did live at the time of taking said deposition, in Jacksonville, in said Morgan County, State of Illinois, the same being at a greater distance than one hundred miles from the city of Omaha, Nebraska, where the court, at which it is expected the said cause will be tried, was by law appointed to be held, to wit, more than three hundred miles therefrom.

I further certify that a notification of the time and place of taking said deposition was made out and served in the city of
65 Omaha on the adverse party, to be present at the taking of said deposition, and to put such interrogatories as it might think fit, as appears by said notice and the due acceptance thereof, which said notice, with said acceptance endorsed thereon, is attached to this deposition and made a part thereof.

I further certify that at the time and place mentioned in said notice, to wit, at my office in Jacksonville, Morgan County, State of Illinois, on the 10th day of April, A. D. 1875, commencing at the hour of 10 o'clock of said day, the said Aaron Hammond, witness, accompanied by H. G. Whitlock, as counsel, and John M. Thurston, representing the city of Omaha, defendant, appeared, and the said Aaron Hammond, witness, who was and is of sound mind and lawful age, was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of said witness, and from his statements, and after carefully reading the same to said witness, the subscribed the same in
66 my presence. I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand, to the court for which the same was taken. And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and notarial seal this 12th day of April, A. D. 1875.

[SEAL.] ROBERT D. RUSSELL,
Notary Public within and for said Morgan County.

Notary's fees, $12.75, paid by Aaron Hammond, complainant.

Upon the back of said depositions appear endorsements in words and figures following, to wit:

No. 90, C.—In the circuit court of the United States for the eighth judicial circuit and district of Nebraska. Aaron Hammond, plaintiff, vs. The City of Omaha, defendant. Deposition of Aaron Ham-
67 mond, in behalf of the plaintiff in the above-entitled suit, taken before me, de bene esse, and sealed up by me, and by me directed and transmitted to the clerk of the above-entitled court. Robert D. Russell, notary public. Notary fee, $12.75, paid by plaintiff. Received Apl. 15, 1875, & opened at request of atty. for plff. & filed Apl. 21, 1875. Watson B. Smith, clerk.

Thereupon, afterwards, at the November term of said court and on the 10th day of November, 1875, the following proceedings were had in said case, as appears of record on folio 364, Journal C, of said court, to wit:

AARON HAMMOND
vs.
THE CITY OF OMAHA. } Trial.

This case this day came on to be tried *to* the court and a jury. Thereupon came—

1. H. Fricks,
2. H. J. Hudson,
3. Frank Ferguson,
4. Wm. Parcheu,
5. Wm. H. Curtis,
6. A. B. Fuller,
7. P. Hogue,
8. D. C. Cole,
9. D. Van Etten,
10. N. R. Pinney,
11. Robt. McVicker,
12. P. Schwank,

68 good and lawful men from the body of the circuit and district of Nebraska, who were duly empannelled and sworn to try the issue joined.

The time having arrived for the adjournment of the court, and the trial of this case not being finished, the jury were allowed to separate until the coming in of court to-morrow morning, after being instructed as to their duties by the court.

Thereupon, afterwards, at the said November term of said court, and on the 11th day of November, 1875, the following proceedings were had in said case, as appears of record on folio 373, Journal C of said court, to wit:

AARON HAMMOND
vs.
CITY OF OMAHA. } Trial resumed.

The trial of this case was resumed this day, all the members of the jury empannelled and sworn herein being present. The time having arrived for the adjournment of the court, and the trial of this case not
69 being finished, the jury were allowed to separate until the coming in of court to-morrow morning, after being instructed as to their duties by the court.

Thereupon, afterwards, to wit, on the said 11th day of November, 1875, the charge of the court was filed in said case, which said charge is in words and figures following, to wit:

In circuit court of U. S., dist. of Neb.

HAMMOND
vs.
CITY OF OMAHA. }

The contract upon which this suit is based is dated the 8th day of October, 1870, and if the plaintiff is entitled to recover at all for constructing the wells in question, the right so to do must rest alone on this written contract. It becomes important, then, for you, in the first instance, to determine from the testimony, if you can, whether or not the two wells described in the contract were completed within the time and in the manner stated in the contract. To determine this
70 question you must fairly consider all the testimony of all the witnesses which bears upon the question of time and manner of constructing the wells.

"The contract seems to require that the work on the wells should be done under the direction and supervision of the chief engineer of the fire department. The testimony here tends to show that Jos. F. Sheely was the chief engineer of the fire department at the time the contract was made, and at the time the wells were constructed. And if you believe from the testimony that he was acting in the capacity of chief engineer of the fire department at the time of constructing the wells, and as such chief superintended the work and directed operations thereon during the progress thereof, and that the same were constructed and completed in a manner satisfactory to him, as such chief engineer, and were then and afterwards accepted and used by the city for the purposes for which they were constructed, and are still used for such purpose by said city, then you would be warranted in finding that Hammond substantially complied with his part of the contract."

Excepted to.

71 The contract-price for constructing the wells in question is fixed and certain. About that there is no controversy here. The contract was for the payment of one hundred dollars in city warrants for each one thousand gallons of water that the wells should produce in twenty-four hours; at least the warrants were to be of the nominal value of one hundred dollars for each thousand gallons of water the wells would produce in twenty-four hours.

The question about which you may have some difficulty is relative to the producing capacity of the wells in question.

There is no method pointed out in this contract by which the producing capacity of the wells are to be ascertained. We have, then, to apply some practical common-sense rules for the purpose of testing the capacity of the wells. To do this, and for the purpose of showing such capacity, several witnesses have been placed upon the stand to show how much water the wells contained, how long it takes at different times to pump the water out, and the length of time it would take at different times for the wells to refill. Now, the real question at is-
72 sue here seems to be not what quantity of water these wells will hold under certain circumstances, but what quantity of water would they produce during a period of 24 hours. This is what the contract calls for, and by it both parties are bound. You are to carefully consider all the testimony bearing on this branch of the case, and find from the evidence as well as you can the probable quantity of water these two wells were capable of producing in 24 hours. When you do this you ought to allow the plaintiff the sum of $100 in city warrants for each one thousand gallons of water the wells were capable of producing in 24 hours. When this is done, then deduct from the amount the sum of six hundred dollars, already paid in city warrants, and if there be a balance due the plaintiff in city warrants, then the same are to be computed at ninety cents on the dollar, which balance, together with interest thereon at ten per cent. from the time of completing the wells, will be the measure of damages to which the plaintiff may be entitled.

Upon the back of said charge of the court appear endorse-
73 ments in words and figures following, to wit:

No. 90. C. Hammond vs. City of Omaha. Charge to jury by Judge Dundy. Filed Nov. 11th, 1875. Watson B. Smith, clerk.

Thereupon, afterwards, at the November term of said court, and on the 12th day of November, 1875, the following proceedings were had in said case, as appears of record on folios 388 and 392, Journal C of said court, to wit:

AARON HAMMOND
vs.
THE CITY OF OMAHA. } Order for meals.

It is ordered by the court that the U. S. marshal for this district procure and furnish the jury empannelled herein the necessary meals while they may have this case under consideration.

AARON HAMMOND
vs.
THE CITY OF OMAHA. } Trial concluded.

The trial of this case was resumed this day, all the members of the jury empannelled and sworn herein being present.

74 The said jury having heard the evidence adduced, the arguments of counsel, and the charge of the court, retire to their room under the charge of a bailiff for that purpose specially sworn, to consider of their verdict.

Whereupon the said jury returned into court and presented to the court their verdict; which is in words and figures following, to wit:

AARON HAMMOND
vs.
THE CITY OF OMAHA. } Verdict.

We, the jury duly empannelled in the above cause, do find for the plaintiff, and do assess his damages in the amount of $6,531\frac{67}{100}$.

H. J. HUDSON, *Foreman.*

R. SCHWENK.
D. VAN ETTEN.
D. C. COLE.
HERMAN FRICKE.
A. B. FULLER.
N. R. PINNEY.
P. HOGUE.
B. F. FERGUSON.
WILLIAM PARCHEU.
W. H. CURTIS.
ROBERT MCVICKER.

Thereupon, afterwards, to wit, on the 15th day of November, 1875, a motion was filed in said case; which said motion is in words and figures following, to wit:

75 In circuit court, district of Nebraska.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT. } Motion for a new trial.

And now comes the defendant above named, and moves the court to set aside the verdict of the jury rendered herein and grant him a new trial, for the following good and sufficient reasons, to wit:

I. That the court erred in admitting the evidence of Aaron Hammond, a witness in said case, tending to show that the chief engineer of the fire department of the city of Omaha had consented to and permitted said Hammond to change the plans and specifications of the contract and perform his work thereunder in a manner not authorized by said contract.

II. That said court erred in refusing to give to the jury the third instruction asked for by defendant's attorney.

III. That said court erred in instructing the jury as to the effect of the acceptance of the work by the chief engineer aforesaid and of the use thereof by the defendant.

76 IV. That said court erred in instructing the jury as to the legal construction of the contract between the plaintiff and defendant.

V. That said court erred in refusing the motion of the plaintiff for a non-suit and for a direction to the jury to return a verdict for the defendant.

VI. That said verdict is not sustained by the evidence, but is contrary thereto.

VII. That said verdict is excessive and unjust.

VIII. That said verdict should have been for the defendant and not for the plaintiff.

IX. For various other and manifold errors and irregularities occur'ing at said trial and appearing upon the records herein.

JOHN M. THURSTON,
Attorney for Defts.

Upon the back of said motion appear endorsements in words and figures following, to wit:

90 C. Aaron Hammond vs. The City of Omaha. Motion for a new trial. Filed Nov. 15th, 1875. Watson B. Smith, clerk. J. M. Thurston, deft.'s atty.

77 Thereupon, afterwards, to wit, on the 25th day of November, 1875, a bill of exceptions was filed in said case; which said bill of exceptions is in words and figures following, to wit:

United States circuit court, district of Nebraska.

AARON HAMMOND, PLAINTIFF,
vs.
THE CITY OF OMAHA, DEFENDANT. } Action upon a contract.

Be it remembered that on the trial of this cause, at the November term of the United States circuit court for the district of Nebraska, the said Aaron Hammond, to maintain the issue on his part, proved and gave in evidence to the jury, among other things, the contract set out in the petition herein; which said contract was in writing, and in the words and figures following, to wit:

(Copy of contract.)

This agreement, made & concluded the 8th day of October, A. D. 1870, by and between A. Hammond, of Jacksonville, Illinois, party of the first part, and the City of Omaha, Nebraska, of the second part,

78 witnesseth: That the said party of the first part, in and for the consideration hereinafter expressed, to be paid by the said party of the second part, hereby agrees with the said party of the second part to sink and construct two wells, one on California street, between 13th and 14th streets, and one at the intersection of Jackson and 14th streets, in said city; said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall, (9) nine inches in thickness, and arched over in a secure and proper manner; the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city. The whole work to be completed within three months from the date of this contract.

And the said party of the second part, for and in the consideration of the performance of the said work to be performed by the said A. Hammond, for the use and benefit of the said party of the second part, hereby agrees to pay the said party of the first part the sum of one hundred dollars ($100) for each and every one thousand gallons of water which each of said wells shall be capable of producing and shall produce within twenty-four
79 hours, the capacity of said wells to be tested by the chief engineer of the fire department of the city of Omaha aforesaid; and upon the report of said officer being made to the city council of said city, showing that the well or wells are completed and satisfactory, and also showing the amount of water the said well or wells will produce in twenty-four hours, then the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in city warrants, as follows, viz, three-fourths of the said sum to be paid on the completion and acceptance of the first well, the other fourth to be retained until the completion and acceptance of the second well, when the entire sum is to be paid.

In witness whereof we have hereunto set our hands the year and day first above written.

(Signed) A. HAMMOND.
E. A. ALLEN,
Prest. of City Council.

[U. S. stamp, cancelled.]

And the said plaintiff, for the purpose of further maintaining
80 his said action, among other things presented evidence to the jury showing that said two wells were constructed at the places designated in said contract, and were completed within the time fixed by the contract, under the supervision and to the satisfaction of the chief engineer of the fire department of said city of Omaha; that each of said wells were sunk circular, twelve feet in diameter, and were curbed with a brick wall nine inches in thickness, so that said wells measured 10½ feet inside said brick wall. And said plaintiff further presented evidence to said jury tending to show that said wells were arched over in a secure and proper manner, and that said two wells were each sunk as aforesaid to a depth of from twenty to twenty-three feet, which was as deep as the suction-pipe of the steam fire-engines then in use by defendant would reach, for which purpose said wells were to be used; that in the center and at the bottom of each of said wells two small shafts were sunk for the purpose of reaching additional veins of water and increasing the supply into said main wells, the diameter of said shafts
81 being about four feet; said shafts being sunk in one of said wells to a depth of from four to six feet, and in the other to a depth of from fifteen to twenty feet, and were substantially curbed with timber; all done under the direction and supervision of said chief engineer of said fire department, and to his entire satisfaction; and that upon the construction and completion of said wells by said plaintiff, in the manner aforesaid, they were by said defendant taken possession of under said contract and used without objection.

Evidence was further presented to said jury tending to show that said defendant did not, by its authorities or officers, except as above stated, and except by the payment to said plaintiff of $600.00 on said contract before the completion of said work, and the making of an order after the completion of said wells that said engineer test the capacity of said wells under said contract, consent to or approve of any change in the terms of said contract, or in the specifications or character of the work done thereunder, or in the dimensions of said wells.

82 And thereupon further evidence was presented to the jury tending in no wise to change or contradict the evidence above set forth.

And thereupon, at the close of all the testimony offered in the trial of said cause, the judge of said court charged the jury as follows, to wit:

Charge to the jury.

The contract upon which this suit is based is dated the 8th day of October, 1870; and if the plaintiff is entitled to recover at all for constructing the wells in question, the right so to do must rest alone on this written contract. It becomes important, then, for you, in the first instance, to determine from the testimony, if you can, whether or not the two wells described in the contract were completed within the time and in the manner stated in the contract. To determine this question, you must fai'ly consider all the testimony of all the witnesses which bears upon the question of time and manner of constructing the wells. The contract seems to require that the work on the wells should be done under the direction and supervision of the chief engineer
83 of the fire department. The testimony here tends to show that Jos. F. Sheely was the chief engineer of the fire department at the time the contract was made, and at the time the wells were constructed. And if you believe from the testimony that he was acting in the capacity of chief engineer of the fire department at the time of constructing the wells, and, as such chief, superintended the work and directed operations thereon during the progress thereof, and that the same were constructed and completed in a manner satisfactory to him as such chief engineer, and were then and afterwards accepted and used by the city for the purpose for which they were constructed, and are still for such purpose by said city, then you will be warranted in finding that Hammond substantially complied with his part of the contract.

The contract-price for constructing the wells in question is fixed and certain; about that there is no controversy here. The contract was for the payment of one hundred dollars in city warrants for each one thousand gallons of water that the wells would produce in twenty-four hours at least; the warrants were to be of the nominal value of
84 one hundred dollars for each thousand gallons of water the wells would produce in twenty-four hours.

The question about which you may have some difficulty is relative to the producing-capacity of the wells in question. There is no method pointed out in this contract by which the producing-capacity of the wells are to be ascertained. We have, then, to apply some practical, common-sense rules for the purpose of testing the capacity of the wells. To do this, and for the purpose of showing such capacity, several witnesses have been placed upon the stand to show how much water the wells contained, how long it takes at different times to pump the water out, and the length of time it would take at different times for the wells to re-fill.

Now, the real question at issue here seems to be, not what quantity of water these wells will hold under certain circumstances, but what quantity of water would they produce during a period of 24 hours. This is what the contract calls for, and by it both parties are bound.

You are to carefully consider all the testimony bearing on this
85 branch of the case, and find from the evidence, as well as you can, the probably quantity of water these two wells were ca-

pable of producing in 24 hours. When you do this, you ought to allow the plaintiff the sum of $100.00 in city warrants for each one thousand gallons of water the wells were capable of producing in 24 hours. When this is done, then deduct from the amount the sum of six hundred dollars already paid in city warrants, and if there be a balance due the plaintiff in city warrants, then the same are to be computed at ninety cents on the dollar; which balance, together with interest thereon at ten per cent. from the time of completing the wells, will be the measure of damages to which the plaintiff may be entitled.

At the close of said charge, the defendant duly excepted to all that portion of said charge relating to the construction and completion of said wells to the satisfaction of said chief engineer, as being a substantial compliance on the part of said plaintiff with the terms of said contract and acceptance thereof by said defendant, from the 22nd to 43d lines of said charge, inclusive.

86 And the said defendant, by its attorney, thereupon requested the judge of said court to charge the jury as follows, viz:

Defendant's instructions.

The defendant asks for the following instructions:

I. The plaintiff claims a verdict for the amount due him for constructing two wells according to the terms and specifications of a certain contract, and the plaintiff, in order to recover, must prove a full performance of the terms and specifications of such contract; and if he failed in any important particular in constructing said wells according to contract, he is not entitled to a verdict.

Given.—E. S. D.

II. The plaintiff could not, under the contract, make any important change in the width of the wells, in the material used for curbing, or in any other material particulars, unless such change was authorized and consented to by the city of Omaha. And the chief engineer of the fire department of said city could not consent to or authorize any change in the terms of the contract, or in the manner of constructing said wells, unless authorized so to do by the city authorities of said city.

Given.—E. S. D.

87 III. In this action, if the plaintiff did not construct said wells according to the terms of his contract, he cannot recover, even though the wells have been used by the authorities of said city.

Refused. Deft. excepted.—E. S. D.

And the judge of said court thereupon gave the jury the first and second instructions requested as aforesaid, but refused to give the third instruction as requested, to which refusal the defendant, by its attorney, then and there duly excepted.

Whereupon the counsel of the said city of Omaha aforesaid, as the matters aforesaid do not appear of record herein, prayed that the said judge would set his hand and seal to this its bill of exceptions; and thereupon the judge aforesaid, at the request of said counsel, did sign and seal this bill of exceptions.

24 Nov., 1875.

ELMER S. DUNDY, *Judge.* [SEAL.]

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit:

88 No. 90 C. Hammond vs. City of Omaha. Bill of exceptions. Filed Nov. 25, 1875. Watson B. Smith, clerk.

Thereupon afterwards, at the adjourned November term of said court, and on the 2d day of February, 1876, the following proceedings were had in said case, as appears of record, on folio 454, journal C, of said court, to wit:

AARON HAMMOND *vs.* THE CITY OF OMAHA. } Motion for new trial overruled and judgment.

This cause came on to be heard this day, on the motion of the defendant herein, to set aside the verdict heretofore rendered herein and for a new trial of this cause, and was argued to the court by attorneys for the respective parties.

Whereupon it is ordered by the court, the same being advised in the premises, that said motion of said defendant to set aside the verdict, and for a new trial, be, and the same is, overruled.

It is further ordered and adjudged by the court that said plain-
89 tiff, Aaron Hammond have and recover of and from said defendant, the City of Omaha, the sum of six thousand five hundred and thirty-one & $\frac{67}{100}$ ($6,531.67) dollars debt and damages, and his costs, the same to be taxed by the clerk of this court.

To which ruling and judgment of the court said defendant excepts.

AARON HAMMOND *vs.* THE CITY OF OMAHA. }

Now come the parties herein, and agree in open court, that in case of the absence of the judge of said court, at the time said defendant may have its supersedeas bond ready for approval, that the clerk of this court may approve same.

Thereupon afterwards, to wit, on the 9th day of February, 1876, a bond was filed in said case; which said bond is in words and figures following, to wit:

Supreme Court of the United States.

Know all men by these presents that we, the City of Omaha, Charles J. Karbach and E. C. McShane, as sureties, are held and firmly
90 bounden unto Aaron Hammond in the sum of thirteen thousand two hundred and thirteen dollars, to be paid to the said Aaron Hammond, his executors or administrators; to which payment, well and truely to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 8th day of February, A. D. 1876.

Whereas the above-named the City of Omaha hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the suit of Aaron Hammond against the City of Omaha by the circuit court of the United States for the district of Nebraska:

Now, therefore, the condition of this obligation is such that if the above-named the City of Omaha shall prosecute its said writ of error

to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE CITY OF OMAHA,
By CHAMPION S. CHASE, *Mayor.*
91 CHAS. J. KARBACH.
E. C. McSHANE.

Sealed and delivered in presence of—
M. D. MORAN.

Upon the back of said bond appear endorsements in words and figures following, to wit:

No. 90 C. Aaron Hammond vs. The City of Omaha. Supersedeas bond. Approved and filed Feby. 9, 1876. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the 10th day of March, 1876, a writ of error was allowed, and citation issued is said case; of which the following are the original copies:

92 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Aaron Hammond, plaintiff, and the City of Omaha, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, at Omaha, in said district, this 10th day of March, 1876.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 90 C. United States circuit court, district of Nebraska. Aaron Hammond vs. The City of Omaha. Writ of error. Filed March 10, 1876. Watson B. Smith, clerk.

93 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To Aaron Hammond, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the City of Omaha is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Omaha, this 10th day of March, 1876.

[SEAL.] ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 90 C. United States circuit court, district of Nebraska. Aaron Hammond vs. The City of Omaha. Citation. Filed April 12, 1876. Watson B. Smith, clerk.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 12th day of April, 1876, I received the within citation; and on the 12th day of April, 1876, I served the same upon the within-named Aaron Hammond, by W. J. Connell, his attorney, in Douglas County, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

WM. DAILY,
United States Marshal for the District of Nebraska,
By ELLIS L. BIERBOWER,
Deputy United States Marshal.

Marshal s costs, $.

(Indorsed:) Filed April 12, 1876. Watson B. Smith, clerk.

94 DISTRICT OF NEBRASKA, *ss:*

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, certify that the foregoing folios, from one to 91, contain true and faithful transcripts from the records and pleadings had in said court in the case of Aaron Hammond vs. The City of Omaha, as the same remain of record and on file in my office as said clerk, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said circuit court, at Omaha, this 11th day of August, 1876.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsement on cover:) No. 904. The City of Omaha, plaintiff in error, vs. Aaron Hammond. Nebraska C. C. U. S. Filed 27th October, 1876.

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF OMAHA,

Plaintiff in Error,

VS.

AARON HAMMOND,

Defendant in Error

Assignment of Errors

AND

Brief of Plaintiff in Error.

Supreme Court of the United States.

THE CITY OF OMAHA, *Plaintiff in Error,*

vs.

AARON HAMMOND, *Defendant in Error.*

ASSIGNMENT OF ERROR.

The plaintiff in error assigns as error: 1st. The giving to the jury by the Court below, on its own motion, the following instructions:

"The testimony here tends to show that Jos. F. Sheely was the Chief Engineer of the Fire Department at the time the contract was made and at the time the wells were constructed. And if you believe, from the testimony, that he was acting in the capacity of Chief Engineer of the Fire Department at the time of constructing the wells, and as such Chief superintended the work and directed operations thereon during the progress thereof, and that the same were constructed and completed in a manner satisfactory to him, as such Chief Engineer, and were then and afterwards accepted and used by the city for the purpose for which they were constructed and are still used for such purpose by said city, then you will be warranted in finding that

Hammond substantially complied with his part of the contract."

To which portion of the charge of the Court, defendant in the court below duly excepted.

2nd. The refusal of the Court to give the third request of defendants to the jury, which is as follows :

"In this action, if the plaintiff did not construct said wells according to the terms of his contract he cannot recover, even though the wells have been used by the authorities of said city."

Which refusal to charge was duly excepted to.

S. A. STRICKLAND, *of Counsel.*

In the United States Supreme Court.

THE CITY OF OMAHA, *Plaintiff in Error,*

vs.

AARON HAMMOND, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in the court below brought suit against the city of Omaha on a certain contract in writing, as follows:

"This agreement, made and concluded the 8th day of October, A. D. 1870, by and between A. Hammond, of Jacksonville, Illinois, party of the first part, and the City of Omaha, Nebraska, of the second part, witnesseth, That the said party of the first part, in and for the consideration hereinafter expressed, to be paid by the said party of the second part, hereby agrees with the said party of the second part to sink and construct two wells; one on California street, between 13th and 14th streets, and one at the intersection of Jackson and 14th streets, in said city. Said wells to be circular, twelve feet in diameter, and to be

curbed with a brick wall nine inches in thickness and arched over in a secure and proper manner, the whole to be completed under the supervision and to the satisfaction of the Chief Engineer of the Fire Department of said city. The whole work to be completed within three months from the date of this contract. And the said party of the second part, for and in consideration of the performance of the said work, to be performed by the said A. Hammond, for the use and benefit of the said party of the second part, hereby agrees to pay the said party of the first part the sum of $100 for each and every 1,000 gallons of water which each of said wells shall be capable of producing and shall produce within twenty-four hours.

The capacity of said wells to be tested by the Chief Engineer of the Fire Department of the City of Omaha aforesaid. And upon the report of the said officer being made to the City Council of said city, showing that the well, or wells, are completed and satisfactory, and also showing the amount of water the said well, or wells, will produce in 24 hours, Then the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in warrants, as follows, viz: three-fourths of the sum to be paid on the completion and acceptance of the first well, the other fourth to be retained until the completion and acceptance of the second well, when the entire sum is to be paid."

(The above contract was executed in due form by both parties.)

The suit by the defendant in error was not for the value of the wells, on the theory that they had been used by the city, but was upon the contract, alleging that he had fully

completed the wells, according to the terms thereof, and he could only recover in that case upon proving a strict compliance with the contract. A party doing work upon the land of another under a contract, when his work is used by the person for whom it is done, may sue either upon his contract and prove his full compliance with it or he may sue upon a *quantum meruit* upon the ground that his work has been used and is of value.

2 Parsons on contracts, 523, and cases cited.

In this case the wells were constructed on the streets of the city, on the public ground.

The testimony, as is disclosed by the bill of exception, showed that Hammond dug his wells 12 feet in diameter to a depth of almost twenty-two feet; bricked them up for that distance with a wall 9 inches thick, so the well proper was only 10½ feet in width, and from the bottom of the 22 feet he sunk the wells down very much deeper, one about 5 feet and the other about 17 feet, of a width of only four feet, and curbed them up with plank instead of brick. The evidence further tended to show that no change was ever made in the terms of the contract by consent of parties.

The evidence, it seems to us, showed a clear violation of the express provisions of the contract, which was for wells 12 feet in diameter; these were but ten and one-half feet part way down, and then only four feet. The contract called for a brick curbing nine inches thick—such curbing was only put in the twenty-two feet in depth; the rest of the way the curbing was wood.

The city had a right to a well twelve feet in diameter. As well might the contractor have begun his hole of that width, dug four feet in depth, and then sunk a hole a foot

in width, until he struck a flowing vein of water, and then made the city pay for the million gallons of water it would perhaps produce in twenty-four hours. No matter that the engines then in use by the city had pipes that would only lift water 22 feet. Nothing was said in the contract about the depth of the wells. Had he sunk them 12 feet in width to a depth of a hundred feet and had only obtained a foot of water, the city must have paid him, though it could not raise the water.

But it is said these smaller shafts were sunk to get a greater supply of water.

Why not sink the wells down the full width as the contract called for, and thus obtain the supply?

The answer is plain: It would cost the contractor too much. Easy for him to sink the shafts four feet in width and get a vein of water of greater producing capacity, that would greatly increase his pay and yet be of no benefit to the city.

Why did the city want a well 12 feet in width? Why not four feet? The suction pipe of the engine would go down in one as well as in the other; but the object undoubtedly was to have a well of great width that would act as a reservoir for the accumulation of a large body of water to be used in a case of emergency. This was what was wanted, and not a vein of water at the bottom of a small hole, that if pumped out closely all day would yield almost any amount.

How then could any recovery be had by the defendants in error?

Only upon the theory that the city assented to and ratified the change from the conditions of the contract.

The evidence tended to show that the wells were built under the direction and to the satisfaction of the Chief Engineer. He, however, never assented to any change being made in the terms of the contract, and, indeed, it was admitted in the court below, and will not be disputed here, that an executive officer, such as an Engineer of the Fire Department, cannot consent to or authorize any change to be made in the terms and conditions of a contract being performed under his directions.

Dillon on Municipal Corp., 375, note.

Bonesteel vs. Mayor, 22, N. Y., 160.

Hague vs. Philadelphia, 48, Pa. St., 527.

In no other way did the evidence tend to show that any change in the contract had been assented to by the city. No moneys were paid after the completion of either well, the evidence tending to show that $600 had been paid on account before the completion of either well.

The evidence tended to show, however, that the wells had been taken possession of and used by the city after their completion.

Upon evidence tending to show these facts, the Court charged the jury upon its own motion, among other things, as follows, to which part the plaintiff in error excepted :

"The testimony here tends to show that Joseph F. Sheeley was the Chief Engineer of the Fire Department at the time the wells were constructed, and if you believe from the testimony that he was acting in the capacity of Chief Engineer of the Fire Department at the time of constructing the wells, and as such Chief superintended the work and directed operations thereon during the progress thereof, and that the same were constructed and completed

in a manner satisfactory to him as such Chief Engineer, and were then and afterwards accepted and used by the city for the purpose for which they were constructed, and are still used for such purpose by said city, then you will be warranted in finding that Hammond substantially complied with his part of the contract."

The plaintiff in error asked among others the following instruction, which the Council refused to give:

"3.—In this action if the plaintiff did not construct said wells according to the terms of his contract, he cannot recover, even though the wells have been used by the authorities of said city."

Such giving and refusing we assign as error.

As we have already shown the plaintiff's recovery must rest wholly upon the question as to whether the terms of the contract were complied with or not.

This should have been determined by the jury by comparing the work done with that called for in the contract, and in no other way; but the Judge tells the jury in substance that if the wells were dug under the direction of the Engineer, and have been used by the city, that then the terms of the contract had been substantially complied with, thus basing the right to recover upon the satisfaction of the Engineer and the occupation and uses by the city, and not upon the work being done in the manner called for in the contract. As we have already shown, if the work was not done according to contract, the plaintiff could not recover, even if the Engineer was satisfied and assented to the changes, his whole power being to see that the terms of the contract were complied with.

By such a charge the jury were evidently misled into giving a verdict, because the Engineer had been satisfied with the wells and the city had used them, although they were not constructed according to contract.

The instructions asked for by defendant was clearly good law, and important to a proper decision by the jury.

Its refusal, as well as the charge of the court, raises the question: Can a person sue upon a contract for the contract price, and recover that price for defective work done upon the land of another, even though the other takes possession of and uses the work? We submit not.

We concede that if A constructs a wagon for B under a contract, and B accepts and uses it without objection, then A can recover the contract price, even though the wagon is not such as the contract calls for. But this is of a different class of cases. This is a well constructed on the grounds of the city. Once dug, it is there a permanent fixture. The city may use it the same as a man may use a house or barn built on his land; yet the occupying and using it is not a waiver of the terms of the contract.

See Parson on Contract, 522, note.

Wadleigh vs. Sutton, 6 N. H., 15.

Clinthy on Contracts, 497, note.

But it will be said by the other side that the instruction of the court taken as a whole, compared and analyzed, is good law, and perhaps might be said to embrace very nearly the principle of law asked for in the third request of defendant. Even if such were the case, which we deny, it would not cure the error in refusing to give an instruction asked for which was a correct proposition of law and which might be applied by the jury to the facts in the case. A jury is

not supposed to examine and compare, as a lawyer would, one part of a charge with another, and apply the result to the evidence.

And a party has a right to have a proposition of law given at its request, which may be applicable to the facts, even though the charge already given by the Court leans in the same direction.

We say, then, in conclusion, that the plaintiff brought his action upon a contract for the contract price, that the evidence tended to show a non-compliance with its terms. That the jury were instructed upon the theory that the uses and occupation by the city was a waiver of the specific performance, which it clearly was not in a case of this kind under the law.

That they were further instructed on the theory that the satisfaction of the Chief Engineer with the work would authorize them to find it had been done according to contract, which it clearly would not under the law. That a proper instruction was excluded from the jury, and thereby the jury wrongfully found for the plaintiff when they should have found for the defendant. And we submit that evidence tending to show the facts set forth in the bill of exceptions would not authorize a recovery in any action unless upon the theory of a quantum meruit.

We say, therefore, the judgment below should be reversed, and a new trial awarded.

S. A. STRICKLAND, *of Counsel.*

J. M. THURSTON, *Attorney.*

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM 1876.

THE CITY OF OMAHA,
Plaintiff in Error.

vs.

AARON HAMMOND,
Defendant in Error.

ARGUMENT AND BRIEF FOR DEFENDANT IN ERROR.

W. J. CONNELL,
Attorney.

E. WAKELY,
Of Counsel for Defendant in Error.

Appealed from the U. S. Circuit Court for the District of Nebraska:

IN THE

SUPREME COURT,

OF THE

UNITED STATES.

OCTOBER TERM, 1876.

THE CITY OF OMAHA,
Plaintiff in Error,
vs.
AARON HAMMOND,
Defendant in Error.

ARGUMENT AND BRIEF FOR DEFENDANT IN ERROR.

Appealed from the U. S. Circuit Court for the District of Nebraska.

Action upon a written contract for sinking and constructing two wells in the City of Omaha

I. It is claimed by the plaintiff in error that a portion of the charge to the jury given by the judge before whom the case was tried, was not in accordance with law, and that a certain instruction requested on the part of plaintiff in error was erroneously refused.

II. No error is assigned or claimed with these two exceptions:

III. The defendant in error by the terms of his contract was required to sink and construct two wells, at places in said contract designated, said wells to be circular, *twelve feet in diameter, and to be curbed with a brick wall nine inches in thick-*

ness, and arched over in a secure and proper manner, the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city, within three months from the date of the contract.

IV. The above statement, as to size and manner of constructing said wells, is in the exact language of said contract, and includes every obligation resting upon the defendant in error, as will appear by copy of contract set forth in Bill of Exceptions. Now, in what particular is it claimed the defendant in error failed to perform his part of the contract? It is admitted, without qualification in the Bill of Exceptions, that the two wells were constructed at the places designated in said contract, and within the time fixed by the contract, under the supervision and to the satisfaction of the chief engineer of the fire department of said city of Omaha. That each of said wells were sunk circular *twelve feet in diameter, and were curbed with a brick wall nine inches in thickness*, and were arched over in a secure and proper manner.

In every particular, then, does it clearly appear that the defendant in error fully complied with all the terms and requirements of the contract, and but for two technical objections of counsel it would be conceded that the charge of the judge would have been correct had he even gone to the extreme of instructing the jury that the defendant in error had fully complied with *all* the requirements and conditions of the contract, and that the inquiry of the jury need extend only to that of ascertaining the amount of damages. The two objections referred to are, first, the wells should have been twelve feet *inside the brick*, in place of twelve feet inside the well after sinking and before bricking the same.

It is to be regretted on the part of defendant in error, that the testimony in this case is not fully embodied in the Bill of Exceptions, and that we have not something more than the mere objections of counsel to comment upon. Why should the wells be required to measure 12 feet inside the brick? The language of the contract is as follows: "Said wells to be

circular, twelve feet in diameter, *and* to be curbed with a brick wall nine inches in thickness." Examine Bill of Exceptions and compare language used in stating completion of contract, with language in contract as to manner of completion. But the counsel for the plaintiff in error contents himself in his bill of exceptions with a simple statement of his objection, without reference to the testimony or want thereof bearing upon such objection.

The wells *were* sunk the required size, and then in pursuance of the terms of the contract, and according to the exact language thereof, were curbed with a brick wall nine inches in thickness; which would leave the measurement of the wells, as shown by the testimony, inside the brick, ten and one-half feet.

It was competent in this case, if any uncertainty existed, to prove the conversations and statements of the parties at the time of executing the contract, as to the size the wells should be sunk, as well, also, as the known and established usage among practical well men respecting the term used in contract with reference to measurement.

It will not be *presumed* that error was committed, but the same must affirmatively appear. 12 Ohio, 10; 1 Ohio State, 253 and 261; 11 Ohio State, 393 and 397.

V. The next objection of Counsel to the defendant in error's performance of his contract is that *under the direction and supervision* of said chief engineer of said fire department and to the *entire satisfaction* of said engineer, he sunk in the bottom of each of said wells a shaft of about four feet in diameter, which was not considered as forming any part of said wells, but was sunk only for the purpose of reaching additional veins of water and increasing the supply into said wells, although no evidence appears showing that this was successful, or otherwise, which shafts were substantially curbed &c. It will be observed by examining the bill of exceptions that while no limit as to the *depth* of the wells was fixed by the contract, that probably being left to the judgment of the

contractor, a practical well man, and the engineer, the wells were sunk only from twenty to twenty-three feet, which was as deep as the suction pipe of the steam fire engines, then in use by plaintiff in error, would reach; for which purpose said wells were to be used. It was, therefore, important and to the interest of the plaintiff in error, as well as defendant in error, that the supply from the bottom into said wells should be as great as possible, and in fact the answer of said plaintiff in error alleges that said wells would be useless and of no value to the city unless they were capable of producing even a much larger quantity than alleged in the petition. The comments of counsel as to what the contractor *might* have done, tend only to show that defendant in error desired to perform and did perform his contract according to the spirit as well as letter thereof, digging only as far as the suction pipe would reach and no further.

VI. Upon the completion of the work, the plaintiff in error, as well as the said engineer, was so well satisfied with said wells that plaintiff in error, as appears by the bill of exceptions, took possession of said wells under the contract and used the same without objection. But how did plaintiff in error take possession? By reason of the wells being in the public streets, the property of the plaintiff in error? Not at all; but as set forth in the bill of exceptions, plaintiff in error took possesson of said wells *under said contract.*

If the wells *were not* completed according to the terms of the contract, why did plaintiff in error make an order after the completion of the wells requiring said engineer to test the capacity of said wells under said contract? Why make the *test under the contract* unless because completed satisfactorily and *according* to the terms of the contract?.

We submit that even if there had been some slight veriations from the terms of the contract in the performance of the work, the same were waived by plaintiff in error upon accepting and testing said wells *under the contract* without objection, and using said wells without objection for the purposes for which the same were intended.

VII. Up to this point we have endeavored to set forth the facts relating to the *performance* of the contract on the part of the defendant in error for the purpose of properly considering the charge of the Court. We now desire to refer to the instruction given, and the instruction refused, which plaintiff in error assigns as the two and only errors committed herein.

Among other instructions ~~of which no complaint is made~~ the judge charged the jury as follows:

"The testimony here tends to show that Joseph F. Sheeley "was the chief engineer of the fire department at the time the "contract was made and at the time the wells were construct- "ed. And if you believe from the testimony that he was act- "ing in the capacity of chief engineer of the fire department "at the time of constructing the wells, and, as such chief, su- "perintended the work and directed operations thereon during "the progress thereof; and that the same were constructed and "completed in a manner satisfactory to him as chief engineer, "and were then and afterwards accepted and used by the city "for the purpose for which they were constructed, and are "still used for such purpose by said city, then you will be war- "ranted in finding that Hammond substantially complied with "his part of the contract."

The foregoing portion of the charge of the Court constitutes the plaintiff in error's first assignment of error, and we submit this, as well as the other portions of the charge, is entirely sound and correct. The plaintiff in error cannot select an isolated portion of the charge, and without reference to the testimony in the case and without reference to other portions of the charge, claim error has been committed.

The charge as a whole is as fair and liberal as plaintiff in error could ask. The Judge in his charge expressly told the jury that it was important for them, in the first instance, to determine from the testimony if the wells were completed in the manner stated in the contract, and that they must fairly consider the testimony of *all* the witnesses bearing upon the question of the *manner* of constructing the wells. The charges of

the court will be regarded as a whole, and if, upon comparing one with the other, the whole case is found to be laid down, and all that could be claimed as law by the plaintiffs and defemdants has been given to the jury, a Court of Error will not select detached portions and decide the case. They will look to all, and, by a comparison of every part, if possible, harmonize every clause, wherever a principle is announced or a rule prescribed—1st Handy, 581; see also 28 Iowa, 289; 22 Iowa, 306; 34, Iowa, 286 and 389; 31, Iowa, 138.

VIII. If any uncertainty existed in the portion of the charge excepted to, it is certainly made definite, and qualified and limited as fully as plaintiff in error could desire, by the second instruction asked for on the part of plaintiff in error, which was given, and reads as follows:

"The plaintiff could not, under the contract, make any im-
"portant change in the width of the wells; in the material
"used for curbing, or in any other material particulars, unless
"such change was authorized and consented to by the city of
"Omaha. And the chief engineer of the fire department of
"said city could not consent to or authorize any change in the
"terms of the contract, or in the manner of constructing said
"wells, unless authorized so to do by the city authorities of
"said city."

IX. The second and only remaining error assigned consists in the refusal of the Court to give the third instruction asked for on the part of the plaintiff in error, and which reads as follows:

"In this action, if the plaintiff did not construct said wells "according to the terms of his contract, he cannot recover, "even though the wells have been used by the authorities of "said city."

It is very clear that this instruction was properly refused by the Court, it having been already given in substance, if not in exact terms in the first instruction asked for on the part of plaintiff in error, which is as follows:

"The plaintiff claims a verdict for the amount due him for

"constructing two wells, according to the terms and specifica-"tions of a certain contract, and the plaintiff, in order to re-"cover, must prove a full performance of the terms and specifi-"cations of such contract; and if he fails in any important "particular in constructing said wells according to contract, he "is not entitled to a verdict."

It is not error for a Court to refuse to give an instruction, which, in substance, has already been given the jury. 1, Ohio, State, 66; 23, Ohio State, 349; 3, Iowa, 502, and case cited in 2 Iowa, Digest (Withrow & Stiles), page 609.

X. While it is contended on the part of defendant in error that the terms of the contract were by him not only substantially but in every particular fully performed, yet we think a substantial performance of a contract is sufficient, and that *unimportant* omissions or variance from the terms of the contract would not deprive the contractor of the right to recover.

In Vorrman *vs.* Voight, 46 California Reports, page 395, Action upon a Contract, the following charge of the Court was assigned as error:

"If you find that the plaintiffs have substantially complied with the contract, they are entitled to a verdict at your hands."

The Supreme Court referring to such instruction says: "Nor do we think, on looking into the instructions, that there was error in instructing the jury that, if the plaintiffs had *substantially* complied with the contract, they would be entitled to a verdict."

XI. It is conceded by the plaintiff in error that the defendant in error fully performed his contract according to the exact terms thereof, in every particular except the two referred to, to-wit: The sinking of the shaft in the bottom of the wells, and sinking said wells twelve feet in diameter, so that the measurement *inside* the brick wall of nine inches on a side, would be only ten and a half feet.

The answer to the petition filed herein, by plaintiff in error

fails to allege or make mention of either of these pretended changes in the contract, and no claim of loss, injury or damage by reason of any change is alleged; but the answer contains only a general allegation that the wells were constructed in so negligent and unworkmanlike manner, as to render the same useless and of no value, although it is not claimed there was one word of proof in support of the said allegation.

In order to sustain the objections here made, even though valid, the answer should specifically have set forth the unauthorized changes in the contract, if any, and allege the damage of plaintiff in error, if any, by reason of such unauthorized changes.

XII. We consider it unnecessary to occupy the time and attention of the Court at greater length in reviewing the facts in this case or to cite more numerous authorities in support of our position. We submit that it clearly appears from the record that no error has been committed in the trial of this case, and that it is evident this appeal was taken for some other purpose than to secure a reversal of the judgment herein rendered, and we therefore ask that the said judgment may be affirmed with interest and costs, and that damages for the delay herein be awarded at the rate of ten per cent. upon the amount of said judgment.

E. WAKELY,
Of Counsel for Appellee.

W. J. CONNELL,
Attorney.